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IN THE
SUPREME COURT OF THE UNITED STATES.

No. 580. October Term, 1945.

WILKY CARRIER CORPORATION,
Petitioner,

vs.

DORIS YOUNG, a minor, by EMIL O. YOUNG, her father and next friend, and EMIL O. YOUNG in his own right; RAYMOND YOUNG, a minor, by EMIL O. YOUNG, his father and next friend, and EMIL O. YOUNG in his own right; PAULINE YOUNG and EMIL O. YOUNG,
Respondents.

RESPONDENTS' BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This is a civil action founded upon Respondents' claims for personal injuries resulting from a collision on or about August 2, 1941, between an automobile in which they were being driven by Emil O. Young, one of the Respondents, and a tractor-trailer combination driven by one Gramlich. They brought their action against Wilky Carrier Corporation (hereinafter called "Petitioner"), and Earl L. Welty

(hereinafter called by name). The action against Welty was dismissed before trial. The action against certain additional defendants was dismissed at the trial. The case was tried in the District Court of the United States for the Eastern District of Pennsylvania on October 18, 19, and November 5, 1943, before His Honor, Judge Kalodner, without a jury. Judgment was awarded to the Respondents against the Petitioner, from which Petitioner appealed to the Third Circuit Court of Appeals, which affirmed the judgment on July 26, 1945, and denied a Petition for Rehearing on September 7, 1945.

The dismissal of the action against Welty occurred at a hearing before Judge Kirkpatrick in the District Court immediately before the trial. When the case was called for trial, Petitioner applied for a continuance, on the ground that Mr. Wilky, an officer of the Petitioner and a potential witness, was in the Army and presently unavailable (10, 15, 17, 33). Respondents were ready for trial, with out-of-town witnesses, and were seeking to avoid the delay and additional expense of a continuance (10, 16). The Court advised that Judge Kalodner was available to hear the case without a jury, if the parties agreed to it, and would grant a reasonable adjournment at the close of the testimony, to permit Petitioner to bring in such witnesses as were unavailable (9, 10, 15).

Mr. Welty's personal counsel refused to waive a jury trial, although all the other parties agreed to it (10). Respondents then moved to dismiss the action against Welty (12). Judge Kirkpatrick developed the fact that Petitioner resisted the motion only on the ground that Welty was solely liable to the Respondents, but did not claim Welty was potentially a joint tortfeasor nor liable over to Petitioner (12, 13, 17, 18). Petitioner's only theory was that Welty was an independent contractor (12). The complaint contained alternative counts, alleging both joint liability in paragraph 4, and sole liability as to each defendant in para-

graphs 5 and 6 (4, 5). Judge Kirkpatrick granted Respondents' motion over Petitioner's objection (19).

The judge's decision was then embodied in a written order. All counsel signified their assent to the order by their signatures (67).

With respect to agency, the Respondents proved that the name of the Petitioner appeared on the side of the truck which caused the accident, and presented no further evidence on the question of agency or ownership (79). The allegation in the complaint, that Welty owned the vehicle, was not offered in evidence by either party.

Petitioner's evidence as to agency was to the effect that the tractor-trailer combination was owned by Earl L. Welty and leased to Petitioner (41, 42, 44, 47, Defendant's Exhibit #9); that Petitioner used leased equipment in the height of its season (45); that Welty had supplied a driver for this particular truck because he was familiar with the equipment (45); that the driver, Gramlich, was paid by Petitioner, a deduction being made out of his wages as a reserve against damage claims (46-49); that Mr. Wilky, of Petitioner corporation, was the dispatcher who sent the driver out and told him where to go (50); and that routing instructions were given to the driver in the form of invoices typed in Petitioner's offices in Buffalo, the starting point of this particular truck (50).

The invoices, which comprise Petitioner's Exhibit #10, are on Petitioner's stationery. They disclose that Petitioner is in the business of transporting freight. The driver of the load with which this truck was dispatched is represented as H. Gramlich, on Petitioner's invoices. Instructions are stamped and printed on the documents, concerning the method by which the consignees should present to Petitioner any claims for damages in transit, and one consignee even noted such a claim.

No evidence was presented as to the nature or extent of any control which Welty might exercise over the driver. It

was not shown that any claims for damage to cargo in transit would be referred to Welty.

Upon this evidence, the learned trial judge held that a presumption of agency arose against the Petitioner, which it had failed to rebut.

ARGUMENT.

I. SUMMARY.

Respondents submit that there is no conflict with the decision of another Circuit, because the decision which has been cited in an effort to establish such a conflict dealt with defendants who were in a relation of primary and secondary liability, whereas the issue in this case as between the defendants was whether the driver of the truck was the agent of the Petitioner or Welty, and there was no question of primary and secondary liability between Welty and the Petitioner.

The Respondents further maintain that the allowance of the voluntary dismissal was not an abuse of discretion nor prejudicial to the Petitioner for three reasons. In the first place, the Petitioner consented to the dismissal. In the second place, the Petitioner advised the Court below that it regarded Welty as being solely liable and did not claim that he was jointly liable. In the third place, if the Petitioner can make out a case of joint liability as to Welty, it has the right to bring an action for contribution against him under the Pennsylvania law.

Finally, the Respondents will argue that the Circuit Court of Appeals correctly construed the Pennsylvania law in holding that a presumption of agency arose when the Respondents proved that Petitioner's name appeared on the truck and then submitted no other evidence on the agency question. The Trial Judge found as a fact that the

Petitioner's oral evidence did not rebut the presumption, and Respondents argue that the Petitioner did not rebut the presumption as a matter of law by documentary evidence that title was in a third person, because Petitioner still was a bailee of the vehicle and failed to show that the driver was not under and subject to the control of the Petitioner; in fact, Petitioner's evidence might well be viewed as supporting the contrary inference that the driver was under its own control.

II. ALLOWANCE OF A VOLUNTARY DISMISSAL AS TO WELTY WAS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

The Petitioner has claimed that the decision of the courts below is in conflict with the case of *Portland Gold Mining Co. v. Stratton's Independence* (CCA 8, 1907), 158 Fed. 63, 16 L.R.A.N.S. 677. It appears, however, that this case was an action for trespass against two defendants, one the lessor and one the lessee of mining property who were in such relationship that the lessor could not be held liable for the lessee's trespass, unless the lessor adopted or ratified it. The court below gave binding instructions in behalf of the lessee, plaintiff consenting. It was held that the lessor was therefore relieved of liability, because its responsibility was necessarily dependent upon the culpability of the lessee. In other words, the only possible theory or basis of recovery was that the lessor and lessee had put themselves in the relationship of principal and agent; consequently the discharge of the agent, who was primarily liable, inevitably discharged the principal.

In the case at bar, there is no question of primary and secondary liability between Welty, the party who was discharged, and the Petitioner. The "immediate actor" was Gramlich, the driver of the truck, and the issue in the case

was whether the Petitioner or Welty was responsible as the employer of Gramlich. Since the liability of the Petitioner was in no way derivative from Welty, it appears that the Portland Gold Mining Co. case is distinguishable.

III. THE ALLOWANCE OF A VOLUNTARY DISMISSAL WAS NOT PREJUDICIAL TO THE RIGHTS OF PETITIONER.

Respondents submit that the record in this case shows that the dismissal of the action against Welty occurred by stipulation of counsel.

Under Federal Rule of Civil Procedure 41 (a) (1), an action may be dismissed by the plaintiff "by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action".

In the case at bar the dismissal of the action against Earl L. Welty was at first contested by Petitioner's counsel (9a-19a). Consequently, having decided in favor of the Motion to Dismiss, Judge Kirkpatrick prepared an order embodying his decision. After the order was prepared, all of the counsel who had appeared generally consented to the order, and Petitioner's counsel's name heads the list of those consenting to its entrance. The consent was manifested in the following form:

"October 18, 1943.
Enter:
OK JJ McDevitt Jr.
OK Aaron White of
Sporkin & Sporkin, attys.
for Beatric Morrison
Langdon W. Harris Jr.
for pltfs.
JGWelch for deft.
E. L. Welty" (67a, 68a).

It further appears that the District Court Judge exercised his discretion with extreme care for the Petitioner's rights, before allowing the Motion to Dismiss. He questioned Petitioner's counsel very closely to determine clearly and definitely the fact that Petitioner did not claim that Welty was a joint tortfeasor nor liable over to the Petitioner and the Judge developed the fact that the Petitioner's only theory of the case was that Welty was solely liable to the Respondents (12, 13, 17, 18).

The fact that the Petitioner's theory was one of sole liability is manifested in the following excerpt from the record:

> "The Court: You don't claim Welty is liable to you?
> Mr. McDevitt: I claim the liability is on Welty."
> (12)

It was clearly the understanding of the District Court Judge that the Petitioner claimed sole liability on the part of Welty and entertained no theory whatever of joint liability or of liability over to the Petitioner and the Judge stated this repeatedly without contradiction by counsel. Throughout the trial, the only theory of the Petitioner was that the sole responsibility was on Welty as an independent contractor and the theory of joint liability was not raised by the Petitioner until after the trial.

Respondents submit that it is quite apparent from the discussions between counsel and the Court (9-19) that the Court would have held Welty as a party on the record, if the Petitioner had made any claim that Welty was jointly liable or liable over to Petitioner. He based his decision expressly on the Petitioner's only theory, which was to the contrary.

Respondents submit that in allowing a dismissal as to Welty, the District Court Judge was adhering to the principle that where a co-defendant is in the case on an allegation only of sole liability, and the plaintiffs refuse to assert a claim against him, the presence of the co-defendant on

the record becomes useless and it will be eliminated by the Court, over the objections of the chief defendant:

General Taxicab Association v. O'Shea (Ct. App. Dist. Col., 1940) 109 Fed. (2d) 671;
Satink v. Holland Township (D.C.N.J., 1940) 31 Fed. Supp. 229;
Delano v. Ives (D. C. Pa., 1941) 40 Fed. Supp. 672;
Brady v. Black Diamond S. S. Co. (D.C.N.Y., 1941) 45 Fed. Supp. 338;
Whitmire v. Partin (D. C. Tenn., 1941) 2 F.R.D. 83.

Finally, it is submitted that the Petitioner did not lose its right to recover contribution from Welty, if it could substantiate a theory of joint liability.

This accident occurred in Pennsylvania, where a common law right of contribution between joint tortfeasors has existed for many years in negligence cases:

Armstrong County v. Clarion County (1870), 66 Pa. 218, 5 Am. Rep. 368;
Goldman v. Mitchell Fletcher Co. (1928), 292 Pa. 354, 141 A. 231.

Under the Armstrong County case, it is not a prerequisite of contribution that both joint tortfeasors shall be parties to the original action.

This rule has been embodied in the statutory law of Pennsylvania by the Act of June 24, 1939, P. L. 1075, Section 1, which reads as follows:

> "Contribution shall be enforcible among those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary."

IV. THE CIRCUIT COURT OF APPEALS CORRECTLY CONSTRUED THE LAW OF PENNSYLVANIA ON THE PRESUMPTION OF AGENCY ARISING OUT OF PROOF OF PETITIONER'S NAME ON A BUSINESS VEHICLE.

It has been firmly established, under the Pennsylvania decisions, that the presence of a defendant's name on a business vehicle involved in an accident raises a presumption that the vehicle was operated by an agent or employee of the defendant, within the course and scope of his employment:

Holzheimer v. Lit Brothers (1918) 262 Pa. 150, 105 A. 73;
Hartig v. American Ice Co. (1927) 290 Pa. 21, 137 A. 867;
Talarico v. Baker Office Furniture Co. (1929) 298 Pa. 211, 149 A. 883;
Nalevanko v. Marie (1937) 328 Pa. 586, 195 A. 49;
Marach v. Kooistra (1938) 329 Pa. 324, 198 A. 66;
Sefton v. Valley Dairy Co. (1942) 345 Pa. 324, 28 A. (2d) 313;
Stroman v. Penn Motors Corp. (1923) 82 Pa. Super. 129.

This rule has been adopted, in Pennsylvania cases, by the Third Circuit:

Liberty Baking Co. v. Kellum (C.C.A. 3d, 1935) 79 Fed. (2d) 931.

The presumption is a very strong one. It is applied even though there is some variation between the trade name on the vehicle and the actual title of the defendant: *Vance v. Freedom Oil Works Co.* (1934) 113 Pa. Supr. 280, 173 A. 496; *Reed v. Horn's Motor Express Inc.* (1936) 123 Pa.

Super. 411, 187 A. 275. It also is applied where a municipality is the defendant: *Sweeney v. Pittsburgh* (1943) 348 Pa. 80, 34 A. (2d) 67. The rule has also been extended so that in cases involving pleasure cars with dealer's tags, the presumption is raised against the dealer: *Haring v. Connell* (1914) 244 Pa. 439, 90 A. 910; *Coates v. Commercial Credit Co.* (1933) 310 Pa. 330, 165 A. 377.

The Pennsylvania Supreme Court has laid down very definite standards for rebutting the presumption as a matter of law. It has held that the presumption cannot be rebutted by uncontradicted oral evidence but must go to the jury unless (1) the plaintiff himself disproves agency; (2) indisputable physical conditions disprove agency; or (3) the case is one where in addition to the uncontradicted oral evidence on the side of defendant, there is admittedly genuine or unattacked documentary evidence which relieves defendant from the possibility of liability: *Hartig v. American Ice Co.*, supra; *Talarico v. Baker Office Furniture Co.*, supra.

In the instant case, the only fact supported by documentary evidence and developed by Petitioner in a manner which might be deemed clear and overwhelming, is the fact that the truck was owned by Welty and leased to the defendant. There is no evidence whatever that the driver was not acting within the course and scope of his employment, and while it was asserted that he was under the control and supervision of Welty, the evidence on this point was not sufficient to satisfy the Judge, in his capacity as a fact-finder, and he expressly found as a fact that "the said Howard J. Gramlich was the employee of and on the business of the defendant Wilky Carrier Corp. at the time of the accident." (74)

The crux of the agency question in this case is whether the presumption, which has been raised by showing that the defendant's name was on the side of the truck, is materially affected when the Petitioner has produced documentary evidence to show that ownership was in a third person.

Argument

Respondents maintain that the Circuit Court handled this point in conformity with the Pennsylvania law, and that there is no conflict in the Pennsylvania decisions. The theory of the courts below was that the presumption is not rebutted merely by presenting evidence that the Petitioner was a bailee instead of owner. This theory would seem clearly justified, because the question of agency depends on ascertaining who had control of the instrumentality causing harm and whose business was being served by the instrumentality. The determination of these facts does not depend on proof of ownership.

The Pennsylvania decisions support the proposition that the presumption of agency is not rebutted as a matter of law by placing a title certificate and owner's license in evidence, showing title in a third party.

Sefton v. Valley Dairy Co., supra;
Sweeney v. Pittsburgh, supra;
Prezel v. Spencer (1930) 99 Pa. Super. 404;
Cf. *Marach v. Kooistra*, supra.

A similar decision was made in *Silent Automatic Sales Corp. v. Stayton* (C. C. 8th, 1930) 45 Fed. (2d) 471.

These decisions are in accord with the general rule in Pennsylvania that a bailee, or person in possession or control of the vehicle, is as responsible for the negligence of a driver as if he were the owner:

Kelton v. Fifer (1904) 26 Pa. Super. 603;
Wollaston v. Park (1911) 47 Pa. Super. 90;
Feagles v. Sullivan (1938) 32 Pa. D. & C. 47.

It is of interest to note that in all three of the above cases the Court was dealing with another presumption, namely, that where the owner is present in a vehicle, the driver is presumed to be under his control. In each instance, it was held that the presumption was raised with respect to a bailee as well as an owner.

CONCLUSION.

WHEREFORE, Respondents contend that there is no conflict with a decision of another Circuit, because the decision cited is not analogous to the instant case; that the Petitioner was not prejudiced by the allowance of the voluntary dismissal, because the Petitioner consented to it, and because it was based on the Petitioner's own assertion of a theory of sole liability, and the theory of joint liability was not asserted until after the trial of the case; and because the Petitioner still had a right to proceed for contribution against the alleged joint tortfeasor under Pennsylvania law; and that the Court below properly held that the presumption of agency, arising from the presence of Petitioner's name on the truck, was not rebutted by mere proof of ownership by a third party, since the Petitioner was a bailee of the vehicle.

It is therefore respectfully urged that the Petition for a writ of certiorari be denied.

Respectfully submitted,

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